SUPREME COURT, U. S.
FILED
MAY 10 1977
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1447

H. MAX MURRAY, *et al.*, *Petitioners,*

v.

LAWRENCE S. WAGLE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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16015-5-77

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STATEMENT

After eight years of employment as a teacher in a public high school, respondent's contract was not renewed. In this action he claimed, *inter alia*, that his employment was terminated because of his publicly expressed views on certain controversial issues, in violation of his constitutional right of free speech. After

a nine-day trial, at which some thirty witnesses testified, a jury returned a verdict for respondent. The District Judge set the verdict aside and entered judgment N.O.V. for petitioners, but the Court of Appeals reversed, finding that there was ample evidence from which "the jury could reasonably infer that appellant's termination was motivated by the public expression of his controversial views." (Pet. A-25).

Petitioners' "Statement of the Case" is not an accurate summary of the entire record, but is merely a one-sided statement of petitioners' contentions, most of which were contradicted by respondent's evidence. A balanced summary of the facts is found in the following paragraph from the opinion of the Court of Appeals:

> "Appellant was employed by the R. A. Long High School in 1962. During the first five years of his service his competency as a teacher was not challenged seriously enough to inspire any suggestion of nonrenewal of his contract. In the fall of 1965 he was elected chairman of the local chapter of the American Civil Liberties Union. In the spring of 1966 he began to challenge long accepted practices at the high school as violative of the separation of church and state—including holding baccalaureate services at the school and offering prayers at the annual honor society banquet. In October 1967 appellant wrote a letter to the local newspaper expressing his views on the subject. A public controversy ensued which continued into the spring of 1968. Early in the same year, appellant wrote a letter to the local newspaper defending ACLU's position favoring legalization of marihuana. This letter, too, provoked intense public comment, largely critical of appellant. After a year of comparative quiet, it was brought to public attention that appellant had made available to his students a pamphlet titled, 'The Student as Nigger,' which, in unrestrained language, analogized the student-teacher relationship to a system of slavery. There was evidence that criticism of appellant's effectiveness as a teacher began with the church-state controversy, intensified during the marihuana incident, diminished in the lull preceding the distribution of the pamphlet, recommenced following that distribution, and continued until appellant's termination. There is also evidence that in faculty meetings, exchanges between appellant and the school principal and superintendent, and meetings of the board, appellant's expression of controversial views was linked with his possible dismissal. Finally, there was evidence that appellees were aware of the problem of sustaining a dismissal based upon appellant's communications, and deliberately undertook to 'build a record' to support dismissal on other grounds." (Pet. A-24-25; footnote omitted).

ARGUMENT

Petitioners contend that the decision below is in conflict with this Court's recent decision in *Mt. Healthy City School Dist. Board of Education* v. *Doyle*, 97 S.Ct. 568 (1977). They therefore urge the Court either to grant plenary review in this case or to remand it for further consideration by the Court of Appeals in light of *Doyle*.

In fact, however, the issue decided in *Doyle* is not involved here. In *Doyle*, the lower courts had found that a teacher's free-speech activities were *a reason*, but not necessarily *the only reason*, for a teacher's termination. This Court held that, in such a situation, the fact-finder must determine whether the defendants "would have reached the same decision as to respond-

ent's reemployment even in the absence of the protected conduct." 97 S.Ct. at 576.

But in the present case, the jury found that respondent's free-speech activities were *the only reason* for his termination. The District Court's instructions required the jury to make such a finding in order to return a verdict for plaintiff. Those instructions stated in pertinent part:

> "The plaintiff in this case contends:
>
> "A. That he was terminated from employment in the Longview School System *because of his exercise of constitutionally protected rights;* and
>
> B. That *but for his exercise of constitutionally protected rights, plaintiff's contract would have been renewed by defendants.*"
>
> "The defendants contend:
>
> "A. That plaintiff's contract was not renewed because he became an ineffective teacher; and
>
> "B. That plaintiff's non-renewal arose out of a good faith appraisal of his capacity as a teacher, and that said appraisal being done in the regular course of schoool administration.
>
> "In order to prove his claim, the burden is upon the plaintiff to establish, by a preponderance of the evidence, the facts that:
>
> "First: *That the non-renewal of plaintiff's teaching contract was because of his exercise of his constitutional rights.*
>
> "Second, That the non-renewal of plaintiff's teaching contract was the proximate cause of the injury and consequent damage to plaintiff.
>
> * * *

> "The issues to be determined in this case by the jury are these:
>
> "Was the plaintiff non-renewed for probable cause because he had become an ineffective teacher, or was plaintiff non-renewed *because of his exercise of his constitutionally protected rights of free-speech and association?*
>
> "If you find that plaintiff was non-renewed because he had become an ineffective teacher, the jury should return a verdict in favor of the defendants; but, if you find that plaintiff was non-renewed *because of his exercise of constitutionally protected rights of free speech and association,* then you should return a verdict for the plaintiff." (Tr. 2028-2030, emphasis added.)

The District Court also instructed the jury that, in order to find the individual defendants personally liable, it had to find that they "acted in bad faith," i.e., "without having probable cause to believe that plaintiff was ineffective as a teacher." (Tr. 2029). As the Court of Appeals noted (Pet. A-25, n. 18), the verdict necessarily indicates that "the jury found appellees had acted in bad faith as defined in the instructions." This finding negates any possibility that the decision to terminate respondent's employment was based even in part on any inadequacy or "ineffectiveness" of his performance as a teacher.

Petitioners' contention that the instruction permitted the jury to return a verdict for plaintiff if it found that even *one* ground for the non-renewal was his free-speech activities is based entirely on a single portion of the District Court's instruction, taken out of context. We believe that even that portion does not support petitioners' contention. But in

any event, it is well-established that a reviewing court must examine the entire instruction, not isolated excerpts, to determine whether any error was committed. See. e.g., *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 728 (5th Cir. 1975); *Batesole* v. *Stratford*, 505 F.2d 804, 809 (6th Cir. 1974); *Gardner* v. *Meyers*, 491 F.2d 1184, 1188 (8th Cir. 1974); *Riley* v. *Layton*, 329 F.2d 53, 57-58 (10th Cir. 1964). In this case, the instruction as a whole clearly required the jury to find that plaintiff's free-speech activities were the *sole* reason for his non-renewal in order to return a verdict in his favor.[1]

Finally, even if there were merit in petitioners' interpretation of the instruction, it is much too late to raise this issue now. Petitioners did not object to the instruction on this ground in the District Court, and Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." As this Court has held, "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." *Palmer* v. *Hoffman,* 318 U.S. 109, 119 (1943). The issue which petitioners now seek to raise in this Court was *never* raised below—either in the District Court or in the Court of Appeals.

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[1] Indeed, the plaintiff teacher contended in the District Court that the instruction was too favorable to the *defendants* in this regard. Thus, plaintiff objected to the instruction on the ground that it "would allow the jury to give a defense verdict even though the jury might conclude that the non-renewal was in part motivated by the [free speech] conduct." (Tr. 1999-2000.) This objection was overruled by the District Judge.

In short, the *Doyle* issue is not present in this case, since the instructions to the jury permitted a verdict for respondent only if the jury found that his free-speech activities were the sole reason for his termination. But even if the instructions might be read as authorizing a verdict for respondent if those activities were only one reason for the termination, petitioners cannot raise this issue now since they did not object to the instructions on this basis in the District Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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